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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

WALTER A. LAVENDER, Administrator De Bonis Non of the Estate of L. E. Haney, Deceased,
Petitioner,
vs.
J. M. KURN et al., Trustees of the St. Louis-San Francisco Railway Company, Debtor, and ILLINOIS CENTRAL RAILROAD COMPANY,
Respondents.
(No. 550. October Term, 1945.)

No. 427

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Missouri

and

SUGGESTIONS IN SUPPORT THEREOF.

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INDEX.

Cases Cited.

Statutes Cited.

INDEX

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(No. 550. October Term, 1945.)

No. .....

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Missouri.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Walter A. Lavender, administrator de bonis non of the estate of L. E. Haney, deceased, and respectfully petitions this Honorable Court to grant a writ of certiorari to review the judgment and opinion of the Supreme Court of Missouri, Division No. 1, rendered and entered on the 10th day of June, 1946, in the case lately pending in said Supreme Court of Missouri, Division No. 1, styled Walter A. Lavender, administrator de bonis non of the estate of L. E. Haney, deceased (plaintiff), respondent, vs. J. M. Kurn et al., trustees of the St. Louis-San Francisco Railway Company, debtor, and Illinois Central Railroad

Company, a corporation (defendants) appellants, being No. 39,174 of causes on the docket of said Supreme Court of Missouri (R. 2-3), reversing the judgment of $30,000.00 and costs of the Circuit Court of the City of St. Louis, Missouri, in said cause in favor of your petitioner and against the respondents herein and remanding said cause for a new trial, which said judgment of the Supreme Court of Missouri, Division No. 1, became final on the 8th day of July, 1946, by the overruling by said court of petitioner's Motion to Set Aside the Judgment of said court and to follow the mandate of this Honorable Court or to grant petitioner a rehearing or to transfer said cause to the Supreme Court of Missouri en banc (R. 22).

OPINION OF COURT BELOW.

The opinion of Division 1 of the Supreme Court of Missouri in said cause of Walter A. Lavender, administrator de bonis non of the estate of L. E. Haney, deceased (plaintiff), respondent, vs. J. M. Kurn et al., trustees of the St. Louis-San Francisco Railway Company, debtor, and Illinois Central Railroad Company (defendants), appellants, which petitioner seeks to have reviewed is reported in 195 S. W. 2d at page 469, and appears on pages 3 to 8 of the transcript of the printed record filed herewith.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

As appears from the record in this cause now on file with this Honorable Court, petitioner, on March 3, 1944, obtained a jury verdict and judgment in the Circuit Court of the City of St. Louis against respondents under the Federal Employers' Liability Act for the sum of $30,000.00, which judgment on appeal to the Supreme Court of Missouri was "reversed, annulled and for naught held and esteemed." The opinion of the Supreme Court of Missouri

is reported in 189 S. W. 2d 253. This Honorable Court granted a writ of certiorari to the Supreme Court of Missouri and the cause was argued before this Honorable Court on March 6th and 7th, 1946. As further appears from the opinion and judgment of record in this court, this Honorable Court reversed the judgment of the Supreme Court of Missouri and remanded the cause "for whatever further proceedings may be necessary not inconsistent with this opinion."

In its opinion it is respectfully submitted that this Honorable Court, after reviewing the evidence, issues and instructions of the entire case on its merits, held that it was "unable, therefore, to sanction a reversal of the jury's verdict against Frisco's trustees," that it would not "approve any disturbance in the verdict as to Illinois Central," and that the Supreme Court of Missouri must "abide by the verdict rendered by the jury" in this cause.

In its opinion this Honorable Court discussed the evidence admitted in the trial court of witness Drashman under the res gestae rule, holding in regard thereto:

> "In view of the foregoing disposition of the case, it is unnecessary to decide whether the allegedly hearsay testimony was admissible under the res gestae rule. Rulings on the admissibility of evidence must normally be left to the sound discretion of the trial judge in actions under the Federal Employers' Liability Act. But inasmuch as there is adequate support in the record for the jury's verdict apart from the hearsay testimony, we need not determine whether that discretion was abused in this instance."

The respondents did not file a motion for a rehearing in this Court, and on May 1, 1946, this Honorable Court issued its mandate to the Supreme Court of Missouri, and said Court received and filed therein the said mandate on May 3, 1946 (R. 1).

Upon receipt of the mandate of this Honorable Court, the Supreme Court of Missouri, at the request of respondents herein, ordered the cause reargued and considered the effect which should be given to the said mandate. On June 10, 1946 (R. 2-3), the Supreme Court of Missouri, in direct conflict with the judgment, opinion and mandate of this Honorable Court, rendered its judgment that the judgment of the Circuit Court of the City of St. Louis rendered in this cause on March 3, 1944, be "reversed, annulled and for naught held and esteemed," and that "said cause be remanded to the Circuit Court of the City of St. Louis for further proceedings to be had therein, in conformity with the opinion of this court" (R. 3). On the same day, June 10, 1946, the Supreme Court of Missouri filed its opinion wherein it stated that "the cause must be retried" (R. 8).

In its opinion of June 10, 1946, the Supreme Court of Missouri reversed the judgment of the trial court on account of the admission of the res gestae statement testified to by witness Drashman, stating that it reversed the judgment "because of the admission of the evidence of the witness Drashman as to what the unnamed Illinois Central switchman told him" (R. 8). This Honorable Court held in its opinion in this case that the admissibility of such evidence "**must** normally **be left to the sound discretion of the trial judge** in actions under the Federal Employers' Liability Act," this court further holding that "inasmuch as there is adequate support in the record for the jury's verdict apart from the hearsay testimony, we need not determine whether that discretion was abused in this instance." The Supreme Court of Missouri, in its opinion of June 10, 1946, in further conflict with the judgment, opinion and mandate of this Honorable Court, reserved for future consideration the question of the excessiveness of the verdict and the question of the admissibility of evidence of witness Mee concerning the distance in which the train involved in the accident could have been stopped

(R. 8), which questions this Honorable Court had previously foreclosed by holding that "we are unable, therefore, to sanction a reversal of the jury's verdict against Frisco's trustees. Nor can we approve any disturbance in the verdict as to Illinois Central."

On June 24, 1946, petitioner filed in the Supreme Court of Missouri, his Motion to Set Aside the Judgment of said Court of June 10, 1946, and to follow the mandate of this Honorable Court, or to grant petitioner a rehearing or to transfer said cause to the Supreme Court of Missouri en banc (R. 8-21). On July 8, 1946, petitioner's said Motion was overruled (R. 22).

On July 12, 1946, petitioner filed with the Supreme Court of Missouri his Motion for a Stay of the Mandate of said court, which motion was sustained on July 12, 1946 (R. 22-24).

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon Section 237 of the Judicial Code (28 U. S. C. A., Par. 344), providing that it shall be competent for this Court, by certiorari, to require that there be certified to it for review and determination any cause wherein a final judgment or decree has been rendered by the highest court of a State in which a decision could be had wherein a title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States.

The judgment of the Supreme Court of Missouri, Division No. 1, sought herein to be reviewed, was originally entered on June 10, 1946 (R. 3). A motion to set aside said judgment and to follow the mandate of this Honorable Court or to grant petitioner a rehearing or to transfer said cause from Division No. 1 to the Supreme Court

of Missouri en banc was filed on June 24, 1946, within the time provided by the rules of the Supreme Court of Missouri (R. 8), and said motion of petitioner was denied by said Division No. 1 of the Supreme Court of Missouri on July 8, 1946 (R. 22), which is the date on which the judgment of said Division No. 1 of the Supreme Court of Missouri in said cause became final. Division No. 1 of the Supreme Court of Missouri, upon its refusal to set aside its judgment and to follow the mandate of this Honorable Court or to grant petitioner a rehearing or to transfer the cause to the Court en banc, was the highest court of the State in which a decision could be had in said cause; and in said cause, petitioner specially set up and claimed a right under a Statute of the United States, namely, the Federal Employers' Liability Act (45 U. S. C. A., Section 51) (R. 20), which right was denied petitioner by said Supreme Court of Missouri, Division No. 1.

The jurisdiction of this Court is also based upon Section 262 of the Judicial Code (28 U. S. C. A., Par. 377), providing that this Court "shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of * * * (its) jurisdiction, and agreeable to the usages and principles of law." The action of the Supreme Court of Missouri in rendering its judgment of June 10, 1946, reversing and annulling the judgment of March 3, 1944, of the Circuit Court of the City of St. Louis, which Circuit Court judgment this Court held in its judgment and opinion of March 25, 1946, should not be disturbed, makes it necessary in the exercise of its jurisdiction that this Honorable Court give effect to its judgment and opinion of March 25, 1946, rendered in this cause.

CASES THOUGHT TO SUSTAIN THE JURISDICTION OF THIS COURT.

Lavender v. Kurn, ... U. S. ..., 90 L. Ed. 692, 66 Sup. Ct. 740;

Martin v. Hunter's Lessee, 1 Wheat. (14 U. S.) 304, 4 L. Ed. 97;

Magwire v. Tyler, 17 Wall. (84 U. S.) 253, 21 L. Ed. 576.

QUESTIONS PRESENTED.

The questions presented by petitioner's petition herein for a writ of certiorari are:

(1) Whether, in an action against railroad carriers under the Federal Employers' Liability Act (45 U. S. C. A. 51) to recover for the death of an employe of defendant railroads, the judgment, opinion and mandate of this Honorable Court, sustaining and affirming a jury verdict and judgment for petitioner in a trial court, by stating and holding that it would not "sanction a reversal of the jury's verdict against Frisco's trustees" and would not "approve any disturbance in the verdict as to Illinois Central," may be evaded and annulled by a judgment and opinion of the Supreme Court of Missouri reversing said verdict and judgment.

(2) Whether in an action against Railroad carriers under the Federal Employers' Liability Act for the injury and death of an employe, where this Honorable Court in its opinion reversed the judgment of the Supreme Court of Missouri and held that it would not disturb the jury verdict against said carriers and that the Supreme Court of Missouri must "abide by the verdict rendered by the jury," and where this Honorable Court in its opinion further held that it was unnecessary to decide whether the allegedly hearsay testimony of witness Drashman was

admissible under the res gestae rule, and further held that rulings on the admissibility of evidence must normally be left to the sound discretion of the trial judge under the Federal Employers' Liability Act, and further held that inasmuch as there was adequate support in the record for the jury's verdict apart from the hearsay testimony of said witness Drashman, this court need not determine whether the trial court abused such discretion, the Supreme Court of Missouri to which this Court directed its mandate ordering said State Supreme Court to take whatever proceedings may be necessary not inconsistent with the opinion of this Court, may nevertheless reverse and annul such jury verdict, and the judgment based thereon, because of the admission of said hearsay evidence of said witness Drashman, under the res gestae rule, and may further reopen questions for future consideration which this Court had determined finally and conclusively by its opinion after its consideration of the entire case on the merits.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

In this case petitioner claims the right to recover under the Federal Employers' Liability Act for the death of respondents' employe. Petitioner obtained a verdict and judgment against both respondents in the trial court and the Supreme Court of Missouri, on appeal, thereafter reversed said trial court judgment. On March 25, 1946 this Honorable Court held that the judgment obtained by petitioner in the trial court should not be disturbed, that it was unnecessary to decide in this case whether the allegedly hearsay testimony of witness Drashman was admissible under the res gestae rule, that rulings on the admissibility of evidence must normally be left to the sound discretion of the trial judge under the Federal Employers' Liability Act and that inasmuch as there was ade-

quate support in the record for the jury's verdict apart from the hearsay testimony of witness Drashman, this court need not determine whether the trial court abused its discretion in this case. This Honorable Court further held that the Supreme Court of Missouri must "abide by the verdict rendered by the jury." After the Supreme Court of Missouri, on June 10, 1946, reversed and annulled the judgment of, and the verdict in, the Circuit Court of the City of St. Louis of March 3, 1944, "because of the admission of the evidence of the witness Drashman," petitioner in his motion to the Supreme Court of Missouri to set aside its judgment and to follow the mandate of this Honorable Court, etc., called the attention of the Supreme Court of Missouri to its failure to follow the judgment, opinion and mandate of this Honorable Court and also called its attention to its evasion and annulment of the judgment, opinion and mandate of this Honorable Court. Said motion was denied by the Supreme Court of Missouri on July 8, 1946. Thereby petitioner was denied a right secured to him by the Constitution and laws of the United States, which denial calls for the issuance by this court of its writ of certiorari herein to bring before this Court for review the entire record of the Supreme Court of Missouri subsequent to its receipt of the mandate of this Honorable Court.

The Supreme Court of Missouri, Division No. 1, by its said judgment and opinion of June 10, 1946, denied petitioner a right specially set up and claimed by him as the administrator of decedent's estate under the Federal Employers' Liability Act, namely, the right to have his case submitted to a jury and the right to secure the benefit of a jury verdict after this Honorable Court has decided that such verdict should not be disturbed.

PRAYER.

Wherefore, petitioner prays that a writ of certiorari be issued by this Court directed to the Supreme Court of Missouri, to the end that said judgment and opinion of Division No. 1 of said Supreme Court of Missouri, rendered and entered on June 10, 1946, in said cause of Walter A. Lavender, administrator de bonis non of the estate of L. E. Haney, deceased, respondent, v. J. M. Kurn et al., trustees of the St. Louis-San Francisco Railway Company, debtor, and Illinois Central Railroad Company, a corporation, appellants, No. 39,174, be reviewed by this Court, as provided by law, and that upon such review said judgment be reversed, that the judgment of the Circuit Court of the City of St. Louis, rendered in this cause on March 3, 1944, be sustained and affirmed, and that this Honorable Court render a final judgment herein in favor of petitioner and against both respondents for the sum of $30,000.00 with interest thereon at the rate of 6% per annum from March 3, 1944, and costs, and that this Honorable Court award execution thereon, and grant such other and further relief as may be appropriate.

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JAMES A. WAECHTER,
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Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

In the opinion of the Supreme Court of Missouri, in said cause of Walter A. Lavender, Administrator de bonis non of the Estate of L. E. Haney, deceased (plaintiff), respondent, v. J. M. Kurn et al., trustees of the St. Louis-San Francisco Railway Company, debtor, and Illinois Central Railroad Company, a corporation (defendants), appellants, which petitioner herein seeks to have reviewed, is reported in 195 S. W. 2d at page 460 and appears on pages 3 to 8 of the transcript of the printed record filed herewith.

STATEMENT OF THE CASE.

The essential facts of the case are stated in the petitioner's petition for a writ of certiorari, and in the interest of brevity are not repeated here. Reference will be made to such facts on the points involved in the course of the argument which follows.

SPECIFICATIONS OF ERROR TO BE URGED.

The Supreme Court of Missouri, Division No. 1, in its said opinion in said cause erred:

(1) In holding and deciding that the admission of evidence of witness Drashman under the res gestae rule was erroneous after this Honorable Court in its opinion of March 25, 1946, had held that such question need not be decided and that rulings on the admissibility of such evidence must normally be left to the sound discretion of the **trial judge** in actions under the Federal Employers' Liability Act, and after this Honorable Court had further held that inasmuch as there was adequate support in the record for the jury's verdict apart from such evidence the

question of the trial court's abuse of its discretion need not be decided, and after this Court had held that "We are unable, therefore, to sanction a reversal of the jury's verdict against Frisco's trustees. Nor can we approve any disturbance in the verdict as to Illinois Central," and had further held that the Supreme Court of Missouri "must abide by the verdict rendered by the jury."

(2) In holding and deciding that it would reserve for future consideration, the question of the admissibility of evidence concerning the distance in which the train could be stopped, after this Honorable Court had held that rulings on the admissibility of evidence in this case must be left to the sound discretion of the trial judge, and after this court had reviewed the entire case and held that there was sufficient evidence of negligence on the part of both respondents to justify the submission of the case to the jury and further held that the jury's verdict should not be disturbed.

(3) In proceeding inconsistent with and in the evasion and annulment of the final judgment, opinion and mandate of this Honorable Court.

SUMMARY OF THE ARGUMENT.

I.

The Supreme Court of Missouri in its judgment and opinion of June 10, 1946, proceeded inconsistent with, and failed to follow, the judgment, opinion and mandate of this Honorable Court.

Lavender v. Kurn, ... U. S. ..., 66 Sup. Ct. 740, 90 L. Ed. 692.

II.

This Honorable Court has power to give effect to its mandates and judgments.

Martin v. Hunter's Lessee, 1 Wheat. (14 U. S.) 304, 4 L. Ed. 97;
Magwire v. Tyler, 17 Wall. (84 U. S.) 253, 21 L. Ed. 576.

ARGUMENT.

I.

In the prior hearing of this cause this Court had before it the entire record in the case, and the same record which the Supreme Court of Missouri had before it when it rendered its judgments and opinions of June 4th, 1945 and June 10th, 1946. In the prior hearing of this cause this Honorable Court also had before it briefs of the parties to the litigation in which were discussed all the issues in the case. Arguments touching the merits of the entire case were made before this Honorable Court on March 6th and 7th, 1946. The parties to this cause discussed every issue which they considered pertinent to the inquiry of whether respondents were liable under the Federal Employers' Liability Act to the representative of the widow and children of L. E. Haney, the deceased employe.

This Honorable Court, in its opinion of March 25, 1946, thoroughly reviewed all the facts in the record bearing upon the issues in the entire case, discussed the questions raised by the parties and held in unequivocal terms that the petitioner made a submissible case and that the verdict of the jury against both respondents **should not be disturbed.**

Upon the receipt of the mandate of this Honorable Court, issued pursuant to its judgment, decree and opinion, the Supreme Court of Missouri, at the request of the respondents herein, ordered a reargument of the case and thereafter on June 10, 1946 in disobedience to the judgment, opinion and mandate of this Honorable Court, entered its judgment and opinion holding that the judgment of the Circuit Court of the City of St. Louis which this Honorable Court had previously held should not be disturbed, should be "reversed, annulled and for naught held and esteemed".

Such action of the Supreme Court of Missouri results in the flittering away of the rights of petitioner under the Constitution and Statutes of the United States, is inconsistent with the opinion of this Honorable Court of March 25, 1946, and evades and annuls the final judgment and mandate of this Honorable Court.

The Missouri Supreme Court's holding, opinion and judgment of June 10, 1946 is inconsistent and in conflict with this Honorable Court's opinion in this case of March 25, 1946, in that this Court discussed and reviewed the competency of the alleged hearsay testimony, admitted under the res gestae rule, of witness Drashman, and on this question held:

> "In view of the foregoing disposition of the case, it is unnecessary to decide whether the allegedly hearsay testimony was admissible under the res gestae rule."

The Missouri Supreme Court in its said opinion and judgment ruled inconsistent with the above holding of this Court, by deciding this very question adverse to petitioner and ordering that the Trial Court judgment be reversed because of the admission of said hearsay testimony. This court in further considering the admissibility of evidence in this case stated and held:

> "Rulings on the admissibility of evidence must normally be left to the sound discretion of the trial judge in actions under the Federal Employers' Liability Act."

The Supreme Court of Missouri in its said opinion ruled inconsistent to the above finding and holding of this Court by refusing to leave the admissibility of the testimony of witness Drashman under the res gestae rule to the discretion of the trial judge, but, on the contrary, stated and held

in its opinion that the admissibility of Drashman's testimony was incompetent, and ordered the judgment reversed as to both respondents on that account alone. This was inconsistent and in direct conflict with the holding of this Court on the very same point and issue. This Court further held in its opinion that inasmuch as there was sufficient evidence to support the verdict without the hearsay testimony, that there was no need of deciding whether the trial court abused its decision in admitting the evidence, saying:

> "But inasmuch as there is adequate support in the record of the jury's verdict apart from the hearsay testimony, **we need not determine whether that discretion was abused in this instance.**"

The Missouri Supreme Court's holding in its said opinion is inconsistent and in direct conflict with the last above quoted statement and holding of this Court. Instead of leaving the question of the admissibility of the hearsay testimony to the trial court, as held by this court, the Missouri Supreme Court, inconsistent with said holding, proceeded to determine that question, holding that the hearsay testimony was incompetent and reversing the judgment and verdict obtained by petitioner on that account. This Court held that inasmuch as there was sufficient evidence without the said hearsay testimony, that it need not determine whether the trial court abused its discretion in admitting such evidence. The Missouri Supreme Court, inconsistent and in direct conflict with said holding, usurped the power of the trial judge and decided that the hearsay testimony was incompetent and ordered the trial judgment reversed on that account. The Missouri Supreme Court at the conclusion of its opinion gives as the sole and only ground of reversal of the verdict and judgment the admission of the testimony of witness Drashman under

the res gestae rule. We quote from the last of their opinion:

> "The judgment should be reversed and the cause remanded because of the admission of the evidence of the witness Drashman as to what the unnamed Illinois Central switchman told him. It is so ordered."

The said holding of the Missouri Supreme Court is not only inconsistent with this Honorable Court's judgment, opinion and mandate, but it is in direct conflict therewith.

The Supreme Court of Missouri, instead of adhering to and following the opinion and mandate of this Court of March 25, 1946, as it was its duty to do, quoted from, adhered to and followed its former opinion of June 4, 1945, which had been reversed by this Honorable Court.

As we said in our motion before the Supreme Court of Missouri to set aside its opinion and judgment of June 10, 1946, all the sophistry to which one may resort could not harmonize such irreconcilable and diametrically opposed opinions and judgments of the Missouri Supreme Court and of this Court.

II.

The judgment of the Supreme Court of Missouri of June 10, 1946, in reversing the judgment of the trial court and in remanding this cause to the trial court for a new trial, is final within the meaning of Section 237 of the Judicial Code (28 U. S. C. A. 344), relating to the power of this Court to review by certiorari a final judgment or decree of the highest court of a State. The judgment of the Supreme Court of Missouri of June 10, 1946 is final and conclusive insofar as to render null and void the judgment, opinion and mandate of this Honorable Court of March 25, 1946. No further judicial proceedings are possible within the State of Missouri to modify or affect in the least the judgment of the Supreme Court of that State, of June 10,

1946, which in effect reversed, annulled and for naught held a judgment, and decision of this Honorable Court. If the doctrine is permitted to prevail that a writ of certiorari in this case is not proper because the judgment of the Supreme Court of Missouri is not final within the meaning of section 237 of the Judicial Code (28 U. S. C. A. 344) then similar action following endless and interminable trials and retrials can effectively prevent the issuance of a writ of certiorari out of this Court at all times in the future. The judgment of the Supreme Court of Missouri is final also in that it finally takes away from petitioner a jury verdict which this Honorable Court held should not be disturbed.

This Court has both statutory and inherent power to give effect to its judgments and decrees. In the early case of Martin v. Hunter's Lessee, 1 Wheat. (14 U. S.) 304, 4 L. Ed. 97, this Court, in a historical decision, rendered a final judgment and awarded execution to the petitioner after the Supreme Court of Virginia had refused to obey its mandate.

The case of Magwire v. Tyler (1873), 17 Wall. (84 U. S.) 253, 21 L. Ed. 576, is similar in many respects to the instant case. In that case plaintiff obtained judgment in the St. Louis Court of Common Pleas, investing him with title to certain real property. The Supreme Court of Missouri reversed the judgment and dismissed the cause. On writ of error this Court reversed the Supreme Court of Missouri and affirmed the trial Court (Magwire v. Tyler, 8 Wall. 668, 75 U. S. 650, 19 L. Ed. 420). Upon receipt of the mandate of this Court the Supreme Court of Missouri again dismissed plaintiff's cause upon the ground that under the Statutes of Missouri legal title to land could not be determined in an equity suit. On a second writ of error this Court entered a final judgment for plaintiff and awarded execution thereon. This Court said (17 Wall., l. c. 282):

"By the direction of the mandate they (Supreme Court of Missouri) were as much bound to proceed and dispose of the case in conformity to the opinion of this court as to reverse their former decree, but instead of that they entered a new decree dismissing the petition, **which in effect evades the directions given by this court and practically reverses the judgment and decree which the mandate directed them to execute. Argument to show that a subordinate court is bound to proceed in such an event** and dispose of the case as directed and that they have no power either to evade or reverse the judgment of this court, **is unnecessary, as any other rule would operate as a repeal of the Constitution and the laws of Congress passed to carry the judicial power conferred by the Constitution into effect.**

"Beyond all question this court decided every question at issue, between the parties, which it was necessary to decide to dispose of the case upon the merits, and it is clear that it is not competent even for this court, after the term expired, to review and reverse such a decree. Repeated decisions of this court have established the rule that a final judgment or decree of this court is conclusive upon the parties, and that it cannot be re-examined at subsequent term, except in cases of fraud, as there is no Act of Congress which confers any such authority. Second appeals or writs of errors are allowed but the rule is universal that they bring up only the proceedings subsequent to the mandate, and do not authorize an inquiry into the merits of the original judgment or decree. . . ."

(L. c. 284:)

"Different theories are put forth as to the ground assumed by the Supreme Court of the State in refusing to proceed with the case as directed in the mandate, and in entering the decree dismissing the petition, but the explanation given in the order of the court shows that the court decided that the petition was a pro-

ceeding to obtain equitable relief in respect to lands therein described, and that the legal title to the premises cannot be tried and adjudged in such a petition, and that inasmuch as the plaintiff had a plain adequate and complete remedy at law, the suit could not be maintained. . . .

"State courts have no power to deny the jurisdiction of this court in a case brought here for decision and sent back with the mandate of the court, which is its judgment. Such a question (that is the question whether the legal title was in the plaintiff, and whether or not he had a plain, adequate and complete remedy at law), might have been raised in the court of original jurisdiction, and perhaps it might have been here where the case was before the court upon the first writ of error, but it is clear that it was too late to raise any such question after the whole case had been decided and the cause remanded for final judgment. . . ."

(L. c. 287:)

"Justice requires that that rule shall be applied in this case, as the case has been pending more than ten years. . . .

"Unless the rule suggested is applicable in this case it is difficult to imagine a case where it would be, as the petition presents every fact constituting the cause of action, and it cannot be denied that the relief prayed is appropriate to the cause of action alleged. . . ."

(L. c. 288:)

"Such a defense was never made in the case until the first opinion of the court heretofore delivered in the case was read in court and published. In that opinion the court decided that Labeaume did not acquire the legal title to the tract. . . . Joseph Brazeau . . . acquired the legal title to the tract. . . . Directed, as the court below was to

proceed in conformity to the opinion of the court, it is quite clear that it was their duty to reverse their judgment and to grant to the plaintiff the relief prayed in his petition. . . ."

This Honorable Court then took up the question of the proper disposition to be made of the case, which question is now before the court in the instant case. In deciding that question this court in the Magwire case made the following disposition (l. c. 289):

> "Such being the conclusion of the court, it only remains to decide what disposition shall be made of the case. Having been once before remanded and the cause being here upon a second writ of error, the court under the judiciary act may, at their discretion, remand the same a second time or proceed to a final decision of the same and award execution. . . . Judging (l. c. 290) from the proceedings of the state court under the former mandate, and the reasons assigned by the court for their judicial action in the case, it seems to be quite clear that it would be useless to remand the cause a second time as the court has virtually decided that they cannot, in their view of the law, carry into effect the direction of this court as given in the mandate. Such being the fact, the duty of this court is plain and not without an established precedent. Martin v. Hunter's Lessee, 1 Wheat. 354. . . . Suffice it to say that the rule is there settled that where the cause has once before been remanded and the state court declines or refuses to carry into effect the mandate of the Supreme Court, the court will proceed to a final decision of the same and award execution to the prevailing party; nor is that a solitary example, as the decree in Gibbons v. Ogden, 9 Wheat. 239, was also entered in this court."

Judging from the proceeding in the Supreme Court of Missouri under the mandate of this Honorable Court, it is

quite clear that it would be useless to remand this cause a second time. The Supreme Court of Missouri refused to follow the mandate of this Court and ordered the judgment of the trial court reversed because of the admission of the testimony of witness Drashman under the res gestae rule, the admissibility of which this court had held was unnecessary to decide and furthermore was a matter of discretion of the trial judge. The Supreme Court of Missouri further refused to follow the mandate of this court by reserving for future consideration the question of the admissibility of evidence of the distance in which the train could be stopped, the admissibility of which evidence this court held should be left to the sound discretion of the trial judge. By such action the Supreme Court of Missouri has indicated that in its view of the law it cannot carry into effect the direction of this court as given in the mandate.

Petitioner submits that in the instant case this Honorable Court in order to give effect to its judgment, decision and opinion of March 25, 1946 as it did in the Magwire case, supra, should enter a final judgment for petitioner for the amount which the jury found he was entitled to and award him execution therefor.

Petitioner therefore prays that this court issue its writ of certiorari herein directed to the Supreme Court of Missouri, that the judgment of Division No. 1 of the Supreme Court of Missouri rendered on the 10th day of June, 1946 be reversed; that the judgment of the Circuit Court of the City of St. Louis rendered on March 3, 1944 be sustained and affirmed and that this Court render and enter its final judgment in favor of petitioner and against respondents for the amount found by the jury, with inter-

est from March 3, 1944, the date of such verdict, and costs, and that this Court award execution therefor, and grant petitioner such other and further relief as may be meet and proper.

Respectfully submitted,

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FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

WALTER A. LAVENDER, Administrator De Bonis Non of the Estate of L. E. Haney, Deceased,
Petitioner,

vs.

J. M. KURN et al., Trustees of the St. Louis-San Francisco Railway Company, Debtor, and ILLINOIS CENTRAL RAILROAD COMPANY,
Respondents.

No. 427.

SUGGESTIONS
Of Respondents in Opposition to Granting Writ of Certiorari.

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INDEX.

Cases Cited.

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JURISDICTION OF THIS COURT.

Though this Court has jurisdiction to issue writs of certiorari in cases involving writs under the Federal Employers' Liability Act **when a final judgment has been rendered by the highest court of a state**, such jurisdiction exists **only when a final judgment by such court has been rendered.** The very wording of the Act makes that clear (Sec. 237, Judicial Code as Amended, Title 28 Judicial Code, Sec. 344, Subdivision b).

The judgment of the Supreme Court of Missouri sought to be reviewed here by writ of certiorari is **not** such a final judgment. After the case had been passed upon by this Court and it had held that the plaintiff had made a case requiring submission to a jury, the case was sent back to the Supreme Court of Missouri and it held that the trial court had committed procedural error in the admission of evidence, and, therefore, remanded the case to the Circuit Court for a new trial.

OPINION OF THE COURT BELOW.

The citation of the opinion here complained of is correctly set forth on page 2 of Petitioner's application for a writ of certiorari under this heading.

STATEMENT OF THE CASE.

The history of the proceedings in this case is correctly set forth on pages 2 and 3 of petitioner's petition for writ of certiorari, but the quotations from this court's opinion on page 5 thereof are so arranged as to be misleading. What this court said after reviewing the evidence was "we hold, however, that there was sufficient evidence of negligence on the part of both the Frisco Trustees and the Illinois Central to justify the submission of the case to the jury and to require appellate courts to abide by the verdict rendered by the jury."

And after discussing the law relative to plaintiff's right to have the case submitted to a jury and the court's reasons for so holding, and bearing in mind that the use of the word "reversal" referred to the **outright reversal** by the Supreme Court of Missouri without remanding, this court said: "We are unable, therefore, to sanction a reversal of the jury's verdict against Frisco's Trustees. Nor can we approve any disturbance in the verdict as to

Illinois Central." The only reversal as to Frisco Trustees and the only disturbance as to Illinois Central referred to meant, of course, outright reversal without remanding to the trial court, this court holding that a jury should pass on the case. The court was not discussing the granting of a new trial, as was later done by the Supreme Court of Missouri, because of procedural error found in the record as to questions of evidence not bearing on Federal questions.

This court did not pass upon the alleged errors in admitting evidence.

As clearly appears from this court's original opinion, that question was left open by said opinion for the Supreme Court of Missouri to pass upon when the case got back to it. The Missouri court did pass upon it in an opinion in which it held that the trial court had committed error on a question of state law—the admission of improper evidence, and ordered a new trial by the trial court. That new trial has not as yet been had. Therefore, the judgment of the Supreme Court here complained of is not final.

Under the heading "Cases Thought to Sustain the Jurisdiction of This Court" in petitioner's brief on page 7 thereof, the cases cited are wholly different from this case. They deal with final judgments in cases involving land titles.

SUMMARY OF THE ARGUMENT.

I.

There is no inconsistency between the judgment and opinion of this court and the judgment and opinion of the Supreme Court of Missouri rendered after the case had been sent back to it, as will clearly appear when the two opinions are read together and read in full.

II.

The proposition that this court has power to give effect to its judgments is not denied. But there is no occasion to invoke that power here, for the judgment of this court is being fully respected in all things by the Missouri court and has been given full effect by it. Nothing that it has done is in any way contrary to the direction of this court; it is merely conducting such "further proceedings as may be necessary consistent with the opinion and judgment of this court," as this court in its judgment and its mandate ordered the Missouri court to do. In its opinion it has submitted to the authority of this court which held merely that plaintiff had made a jury case. The Supreme Court of Missouri accepts that ruling as final, but it had the right to go ahead and pass on allegations of error in the trial of the case. In so doing, it found it necessary to grant a new trial. That is exactly what the Supreme Court of Missouri has done, and it has done nothing more.

III.

Under a long unbroken line of decisions by this court, beginning as far back as 1873, this court has held that a judgment of reversal and remanding for a new trial by the highest court of a state does not constitute a final judg-

ment. In the old cases, when writs of error were permitted, the rule applied to them; and since writs of error have been abolished and writs of certiorari have taken their place, the same rule has universally been applied to writs of certiorari.

Moore v. Robbins, 18 Wallace 588;
St. Clair County v. Lovingston, 18 Wallace 628;
Parcels v. Johnson, 20 Wallace 654;
Mower v. Fletcher, 114 U. S. 127-128;
Haseltine v. Central Bank of Springfield, 183 U. S. 130-131;
Bruce, Admr., v. Tobin, 245 U. S. 19;
The Western Public Service Co. v. City of Mitchell, 289 U. S. 109, 53 Sup. Ct. Rep. 788;
C. C. C. & St. L. Ry. Co. v. Henry, Admr., 290 U. S. 627, 54 Sup. Ct. 70;
Mississippi Central R. R. Co. v. Smith, 295 U. S. 718, 55 Sup. Ct. Rep. 830;
Edgar Bros. Co. v. State Revenue Comm. of Ga., 303 U. S. 626, 58 Sup. Ct. Rep. 761;
Gorman v. Washington University, 316 U. S. 98, l. c. 100-101, 62 Sup. Ct. Rep. 862-863, 869;
Pennsylvania Public Utility Commission v. Cheltenham & Abington Sewerage Co., 317 U. S. 588, 63 Sup. Ct. Rep. 39.

ARGUMENT.

I.

Counsel for petitioner seek to distort the language which this court used in its opinion. It did hold that petitioner had made a submissible case, and that, therefore, the Supreme Court of Missouri was in error in reversing the judgment outright on the theory that no such case had been made; but nothing more was held by this court. When it said "we are unable to sanction a reversal of the jury's verdict against Frisco Trustees. Nor can we approve any disturbance in the verdict as to Illinois Central," it very evidently meant that it would not sanction such a reversal as had been ordered by the Supreme Court of Missouri when it reversed the case outright on the theory that there was no evidence justifying submission of the case to the jury. That was the "reversal" this court said it was unable to sanction, and it gave its reasons for not sanctioning it. The same is true of what is said about approving "any disturbance of the verdict as to Illinois Central." The "disturbance" under consideration was the outright reversal, which it was unable to approve.

Though this court had been requested to pass upon other questions presented by the record, it declined to do so. It made a comment about the general rule under **normal** conditions which appellate courts apply when reviewing the action of trial courts in regard to admission or rejection of evidence claimed to be admissible under the res gestae rule. But that general remark had nothing to do with the conclusion which this court reached, for, having held that the circumstantial evidence (entirely independent of the evidence complained of as hearsay) was sufficient to require submission of the case to the jury, the court felt and announced that it was unnecessary to pass upon that question of evidence. This evidently was be-

cause questions concerning the admission of evidence did not involve Federal questions, and, therefore, were for the state court to pass upon. The court very plainly said, "in view of the foregoing disposition of the case, it is unnecessary to decide whether the alleged hearsay testimony was admissible under the res gestae rule"; and after its comment as to how courts generally "normally" left the question of res gestae to the sound discretion of the trial judge, this court concluded: "But inasmuch as there is adequate support in the record for the jury's verdict apart from the hearsay testimony, we need not determine whether that discretion was abused in this case." That is definitely a question for decision by the Missouri Supreme Court. It is a procedural question with which this court has no proper concern.

Counsel for petitioner try very hard to distort the opinion into a statement that it is unnecessary for either this court or the Supreme Court of Missouri to decide that question, when, on page 15 of their brief, they quote a few words from the opinion, as follows:

> "In view of the foregoing disposition of the case, it is unnecessary to decide whether the allegedly hearsay testimony was admissible under the res gestae rule."

From that quotation they argue that when the Supreme Court of Missouri passed on said question after the case went back to it, it went contrary to the opinion of this court, for they seem to claim that what this court meant by the quoted sentence was that it was unnecessary for any court to pass on that question, and that therefore, there was no occasion for a new trial. But when the whole paragraph from which said short quotation is taken is read together, it will be seen beyond dispute that this court meant merely that it was unnecessary for this court to pass upon that point, for it had held that under the

Federal rule, which caused the case to be brought here, a jury question existed.

That questions concerning the admissibility of evidence are for state courts where they involve no Federal question has been held by this Court, and the decisions are uniform in so holding.

Central Vermont Ry. v. White, 238 U. S. 507, 511. 30 S. Ct. 865, 867;
C. & O. Ry. Co. v. Kelly, 241 U. S. 485, 491.

II.

Counsel for petitioner are making a play upon words when they insist that the latest decision of the Missouri Supreme Court herein has become final. They seek to convince this court that it is final, because they know that under the Judicial Code, Sec. 237, as Amended (Title 28, Judicial Code 344, Subdivision b), this court has no jurisdiction to issue its writ of certiorari unless the judgment complained of is a final judgment of the highest court in the state in which it was rendered. Said judgment has become final only in the sense that the Missouri Supreme Court has ordered a new trial and petitioner's efforts to get that ruling altered have failed. There is nothing more they can do in the Missouri Supreme Court, and unless that judgment is upset by this court, petitioner will have to return to the Circuit Court where a new trial has been ordered to take place. The trial judge had most clearly abused his discretion in admitting the rankest possible hearsay testimony, which the Supreme Court of Missouri held prevented the defendants from having a fair trial and, therefore, it ordered a new trial.

But the judgment of the Supreme Court of Missouri is very far from being a final judgment in the sense of disposing of the case on its merits, which is the kind of final

judgment referred to in the statute above cited, and which is necessary to give this court the right to review by certiorari, final judgments of the highest court of a state.

The record, in order to justify this court in holding that it has jurisdiction, must show a final judgment, one which disposes of a case on its merits; if it does not, then this court is without jurisdiction. The rule so holding has been applied for many decades by this court. The older cases referred to the granting of writs of error, which were permitted only when a final judgment had been rendered in the state court. We have already cited a number of such cases. The later cases deal with writs of certiorari.

In the case of Haseltine v. Central Bank of Springfield, Mo., 183 U. S. 130, 131, a judgment in a Missouri Circuit Court had been reversed by the Supreme Court of that State and the cause had been remanded "for further proceedings to be had therein, in conformity with the opinion of this court herein delivered." A motion to dismiss the appeal was granted by this court, because, as it had frequently held a judgment reversing that of the court below and remanding the case for further proceedings, is not one in which a writ of error will lie. At page 131, the court said:

> "While the judgment may dispose of the case as presented, it is impossible to anticipate its ultimate disposition. It may be voluntarily discontinued, or it may happen that the defeated party may amend his pleading by supplying some discovered defect, and go to trial upon new evidence. To determine whether, in a particular case, this may or may not be done, might involve an examination, not only of the record, but even of the evidence in the court of original jurisdiction, and lead to inquiries with regard to the actual, final disposition of the case by the Supreme Court, which it might be difficult to answer. We have,

> therefore, always made the face of the judgment the test of its finality and refused to inquire whether, in case of a new trial, the defeated party would stand in a position to make a better case. The plaintiffs in the case under consideration could have secured an immediate review by this court, if the court as a part of its judgment of reversal had ordered the circuit court to dismiss their petition, when, under Mower v. Fletcher, they might have sued out a writ of error at once."

In the case of Bruce, Admr. of Tobin, v. Tobin, 245 U. S. 18, this court, after holding that certiorari had taken the place of appeals and writs of error, formerly provided for by the statute, further held that the right of petitioning for review by certiorari was subject to the same limitation as to finality of the judgment of the state court sought to be reviewed which had prevailed under the old statute before the amendment. The court said: "Finality, therefore, continues to be an essential for the purposes of the remedy by certiorari conferred by the Act of 1916." At pages 19 and 20, the court said:

> "It may be indeed said that although the case was remanded by the court below for a new trial, the action of the court was in a sense final because it determined the ultimate right of the father to recover and the general principles by which that right was to be measured. But that contention is not open as it was settled under Section 709, Rev. Stats., Sec. 237, Jud. Code, that the finality contemplated was to be determined by the face of the record and the formal character of the judgment rendered, a principle which excluded all conception of finality for the purpose of review in a judgment like that below rendered. (Citing cases.) The re-enactment of the requirement of finality in the Act of 1916, was in the nature of things an adoption of the construction on the subject which had prevailed for so long a time.

"There being no final judgment within the contemplation of the Act of 1916, the petition for a writ of certiorari is denied."

The same rule has been consistently applied to the present time, and the case of Bruce v. Tobin, supra, has been cited with approval in the following recent cases by this court:

The Western Public Service Co., Appellant, v. The City of Mitchell, 289 U. S. 709, 53 Sup. Ct. Rep. 788;

Mississippi Central R. R. Co. v. Smith, 295 U. S. 718, 55 Sup. Ct. Rep. 830;

Edgar Bros. Co. v. State Revenue Comm. of Ga., 303 U. S. 626, 58 Sup. Ct. Rep. 761;

Gorman v. Washington University, 316 U. S. 98, 62 Sup. Ct. Rep. 962-963 (Decided by this court in 1942).

Applying the aforesaid rule to the situation in this case, we find that this court did not remand this case to the Missouri Supreme Court with directions to enter a judgment of any kind. It simply reversed the judgment that had been entered by the Missouri Supreme Court in which it had held that no case was made for the jury. It then became the duty of the Supreme Court of Missouri to take further proceedings in the case, bearing in mind what this court had held on the only subject upon which it had ruled, to-wit, the propriety or impropriety of submitting the case to the jury. The Supreme Court of Missouri bowed to the decision of this court and then proceeded to take such further steps as were proper to be taken by it in further consideration of the case, not in conflict with the views of this court. A reargument was had, the case was reconsidered by the Missouri court, it reached the conclusion that the defendants had been prejudiced by the admission of improper evidence which was the rankest of

hearsay and necessarily affected the rights of the defendants, that therefore the defendants had not had a fair trial, and accordingly the judgment of the circuit court was reversed and the case was sent back to it for a new trial. What will happen from now on nobody can tell. The parties may get together and arrive at some settlement of the case. Plaintiff may conclude to dismiss his case in the state court and sue in the Federal Court. A new trial may be had in the Circuit Court of the City of St. Louis in which a jury, indulging in speculation, as this court holds it has a right to do, may reach the conclusion that the decedent was not struck by any object protruding from the train, but met his death in some manner which entailed no liability upon any of the defendants. If the jury so concludes, its duty will be to render a verdict for all of the defendants. It may conclude that the Frisco Trustees are liable and that the Illinois Central is not liable, and render its verdict accordingly. Or it may find as the first jury did, that both defendants are liable and it may render a verdict for the same amount as that reached by the first jury, for a less amount or for a greater amount. Then the losing party, whoever that may be, will have a right to appeal to the Supreme Court of Missouri. If it finds that the second trial was conducted in all things according to law, it will affirm the judgment. Then its judgment will be a final judgment, but it will not be a final judgment until that time comes. From a final judgment so rendered, the losing party may seek to escape by asking this court to issue its writ of certiorari, and it may then have jurisdiction because the judgment then rendered will be a final judgment.

Conceding, but not admitting, there was evidence upon which the case should have been submitted to the jury, defendant had an absolute legal right to have the case submitted on competent evidence only. Whether all the

evidence admitted was competent is a procedural question for decision under the rules of practice recognized by the Supreme Court of Missouri. That court has decided there was prejudicial error in the admission of evidence and has granted a new trial. There will be nothing for this court to decide until there is again a final judgment subject to review.

At the present time no final judgment is before this court, and, therefore, it is respectfully submitted that the petition should be denied.

Respectfully submitted,

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INDEX.

Cases Cited.

Textbook Cited.

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Respondents.
No. 427.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

REPLY BRIEF OF PETITIONER.

SUMMARY OF ARGUMENT.

I.

The judgment and opinion of the Supreme Court of Missouri of June 10, 1946, on its face is inconsistent with the judgment and opinion of this Honorable Court.

Lavender v. Kurn, ... U. S. ..., 66 Sup. Ct. 740, 90 L. Ed. 692;
Lavender v. Kurn, 195 S. W. (2d) 460;
Bailey v. Central Vermont R. Co., 319 U. S. 350, 87 L. Ed. 1444, 63 S. C. 1062;

Tennant v. Peoria & Pekin Union R. Co., 321 U. S. 29, 88 L. Ed. 520, 64 S. C. 409;
Tiller v. Atlantic Coast Line R. Co., 323 U. S. 574, 89 L. Ed. 465, 65 S. C. 315;
Blair v. Baltimore & Ohio R. Co., 323 U. S. 600, 89 L. Ed. 490, 65 S. C. 545;
Seago v. New York Central R. Co., 315 U. S. 781, 86 L. Ed. 1188, 62 Sup. Ct. 806.

II.

Having assumed jurisdiction of this cause at the October Term, 1945, this court has jurisdiction to issue its writ of certiorari to give effect to its judgment, opinion and mandate.

12 Cyclopedia of Federal Procedure, par. 6398.

ARGUMENT.

I.

In their argument counsel for respondents accuse petitioner of attempting "to distort the language which this court used in its opinion," and then proceed to attempt to commit the same error of which they accuse petitioner. They point out that what this court in its opinion of March 25, 1946 "evidently meant" was that the Supreme Court of Missouri should not have reversed the case outright on its first consideration thereof, but that it was not limited in disturbing or reversing the verdict of the jury on any subsequent consideration of the case. This court did not so limit the application of its opinion. The opinion on its face shows that the jury verdict against both respondents should not be reversed or disturbed at any time. This court decided and held in its opinion in this case that the verdict should not be reversed or disturbed, saying:

> "We are unable therefore to sanction a reversal of the jury's verdict against Frisco trustee. Nor can we approve any disturbance in the verdict as to Illinois Central."

The Supreme Court of Missouri ruled inconsistent with the above holding and mandate of this court by ordering the verdict and judgment against both of the respondents reversed. It was ordered not to disturb or reverse the verdict; nevertheless, it thereafter ruled inconsistent with that order by reversing the judgment as against each of respondent railroads. If this court had decided as respondents contend that the jury verdict could be disturbed or reversed at a subsequent consideration thereof by the Supreme Court of Missouri, then certainly this court would have so stated in its opinion.

Respondents claim that this court did not pass upon the

admissibility of the evidence and particularly that this court did not pass upon the competency of the res gestae statement of witness Drashman. In this contention respondents are in error. The question of the competency of the res gestae statement of witness Drashman was made an issue in the briefs by all the parties before this court and this court passed upon that question by saying and holding:

> "Rulings on the admissibility of evidence must normally be left to the sound discretion of the trial judge in actions under the Federal Employers' Liability Act. But inasmuch as there is adequate support in the record for the jury's verdict apart from the hearsay testimony, we need not determine whether that discretion was abused in this instance."

It will thus be seen that this Honorable Court passed upon, held and ruled that the admission of evidence in a Federal Employers' Liability Act case **must** normally be left to the sound discretion of the trial judge, not the appellate court. The Missouri Supreme Court ruled inconsistent with this holding and mandate of this court by usurping the power of the trial judge and deciding that the res gestae statement was incompetent and constituted reversible error. This court had held that inasmuch as there was sufficient evidence to take the case to the jury apart from the res gestae statement that it need not be determined whether the trial court had abused its discretion in admitting such evidence. The Missouri Supreme Court ruled inconsistent with this and followed its opinion of June 4, 1945, in holding that the res gestae statement of Drashman was incompetent and ordered the judgment reversed by reason thereof. This first opinion and judgment of the Missouri Supreme Court was reversed by this court's judgment and opinion. The Missouri Supreme Court should have ruled consistent with the above holding of this court in its second opinion and followed the same as it was its duty to do.

In other recent cases before this Court under the Federal Employers' Liability Act, this court has likewise considered such cases on the merits and held that jury verdicts rendered therein were supported by evidence of negligence of defendants, and inferior appellate courts which had held that the verdicts in such cases were not supported by evidence of negligence, unhesitantly obeyed the mandates of this court. For instance:

In the case of Bailey v. Central Vermont R. Co. (5-24-1943), 319 U. S. 350, 87 L. Ed. 1444, 63 Sup. Ct. 1062, plaintiff obtained a verdict and judgment in the trial court under the Federal Employers' Liability Act, which judgment was reversed by the Supreme Court of Vermont, said court holding that the motion for a directed verdict should have been granted because negligence was not shown. This court, on certiorari, reviewed the issues which it was necessary to decide in order to dispose of the case on the merits, held that there was sufficient competent evidence of negligence to support the verdict of the jury and reversed the cause. The printed reports of cases show that no subsequent decision was rendered in the Supreme Court of Vermont, and presumably that court followed the mandate of this court and merely issued its mandate to the trial court affirming the trial court judgment.

In the case of Tennant v. Peoria & Pekin Union R. Co. (1-17-1944), 321 U. S. 29, 88 L. Ed. 520, 64 Sup. Ct. 409, plaintiff recovered a verdict and judgment in a United States District Court under the Federal Employers' Liability Act, which judgment was reversed by the United States Circuit Court of Appeals on the ground that, while there was evidence of negligence by defendant, there was no substantial proof that such negligence was the proximate cause of the employee's death. This court reviewed the issues necessary to be decided in order to dispose of the case on the merits, and held that there was sufficient competent proof to support the charge that the negligence of

defendant was the proximate cause of the employee's death, holding: "We accordingly reverse the judgment of the court below and remand the case to it for further proceedings not inconsistent with this opinion." The same holding was made by this court in the instant case. The printed reports of cases show that no subsequent decision was rendered by the United States Circuit Court of Appeals, leading one to the conclusion that said court must have merely issued its mandate sustaining the judgment of the trial court.

In the case of Tiller v. Atlantic Coast Line R. Co. (1-15-45), 323 U. S. 574, 89 L. Ed. 465, 65 Sup. Ct. 315, plaintiff obtained a verdict and judgment in a United States District Court under the Federal Employers' Liability Act, which judgment was reversed by the Circuit Court of Appeals and the cause remanded, because it held there was no evidence that the alleged violation of the Boiler Inspection Act was the proximate cause of the accident in which plaintiff was injured. This court reviewed the entire case, held that there was sufficient competent evidence to support the jury verdict, and held that "The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed." The printed reports of cases show that no subsequent decision was rendered by the Circuit Court of Appeals, showing thereby that the Circuit Court of Appeals merely issued its mandate sustaining the judgment of the trial court.

In the case of Blair v. Baltimore & Ohio R. Co. (1-29-45), 323 U. S. 600, 89 L. Ed. 490, 65 Sup. Ct. 545, plaintiff obtained a verdict and judgment in the trial court under the Federal Employers' Liability Act, which judgment the Supreme Court of Pennsylvania reversed on the ground that there was no evidence of negligence to support the verdict. This court, on certiorari, reviewed the evidence, held that there was sufficient evidence to support the jury verdict on the question of negligence, reversed the judg-

ment of the Supreme Court of Pennsylvania and remanded the cause "for proceedings not inconsistent with this opinion." The Supreme Court of Pennsylvania thereafter vacated and rescinded its judgment of reversal and remanded the cause to the trial court for proceedings therein not inconsistent with the opinion of the United States Supreme Court (353 Pa. 105, 44 A. [2d] 279). The trial court thereupon proceeded "to vacate and rescind our order granting a new trial and to order that **judgment be entered on the verdict.**"

In the cases hereinabove mentioned this court reviewed and decided all the issues necessary to be decided in order to dispose of the cases on the merits and held that the jury verdicts were supported by evidence of negligence of the defendants. In the instant case this court went further and specifically pointed out that the jury verdict should not be reversed or even disturbed, and that the Supreme Court of Missouri must "abide by the verdict rendered by the jury." No language is needed to explain the meaning of the opinion of this court.

In the case of Seago v. New York Central R. Co., 315 U. S. 781, 86 L. Ed. 1188, 62 Sup. Ct. 806, this court reversed a judgment of the Missouri Supreme Court in a case under the Federal Employers' Liability Act in which the Missouri Supreme Court on appeal by the plaintiff from an adverse judgment, had held that there was not sufficient evidence of negligence to submit the case to the jury and that, therefore, they would not consider questions of erroneous instructions given on behalf of the defendant railroad. This court in a memorandum opinion reversed the Missouri Supreme Court and held and stated:

> "The petition for writ of certiorari is granted and the judgment is reversed on the ground that there was sufficient evidence of negligence for submission to the jury. The case is remanded to the Supreme

> Court of Missouri for its consideration of other questions presented on the appeal and for further proceedings not inconsistent with this opinion."

The Missouri Supreme Court upon receiving said mandate proceeded consistent with the above opinion by reversing its former judgment and considering other questions presented on the appeal and sustaining the appeal of the plaintiff and ordering a new trial. Seago v. New York Central R. Co., 349 Mo. 1249, 164 S. W. 2d 336.

In the case at bar this court did not in its opinion and mandate direct that the Missouri Supreme Court should consider other questions presented on the appeal, because all the questions presented on the appeal had been decided by this Court. This court only directed in the instant case that the cause be remanded for further proceedings not inconsistent with the opinion. In other words, when this court finds that other questions should be decided by lower appellate courts, then, as in the Seago case, supra, it directs that said courts consider said questions and decide the same. In the instant case the Missouri Supreme Court did not have any questions before it to be decided, because this court had decided all questions in the case necessary to be decided in order to dispose of the case on the merits.

The argument of counsel for respondents that the question of the admissibility of evidence in this case involves a procedural question beyond the power of this court to consider is without merit. The rights claimed by petitioner arise under a Federal Act and such rights are protected by Federal rather than local rules of law. In the cases hereinabove cited, supra, and in the prior consideration of the instant case, this court determined that there was sufficient competent evidence to support the jury verdicts. If the Supreme Court of Missouri can rule, as it did in the instant case, that evidence, consisting of the statement of witness Drashman, was inadmissible, after this court had

specifically discussed such evidence in its opinion, and held that such evidence need not be considered since the other evidence in the case adequately supported the jury's verdict, and that the admission of such evidence must be left to the discretion of the trial judge, then the authority of this court to decide the cases hereinabove mentioned and the instant case did not exist, and the theory that the judgments and opinions of this court are final and binding is a delusion.

II.

Respondents cite a number of cases in an attempt to show that the decision of the Supreme Court of Missouri sought herein to be reviewed is not final. This court during the October Term, 1945, assumed jurisdiction in this cause and decided that the jury verdict should not be reversed, nor even disturbed. The instant proceeding does not concern the merits of the controversy between the parties to the cause, but concerns solely the question of whether the Supreme Court of Missouri has obeyed the judgment, opinion and mandate of this Court. Having already assumed jurisdiction, this court has both the inherent and statutory power to give effect to its judgments. The cases cited by respondents under part II of their argument are therefore irrelevant, for in none of said cases did an inferior appellate court refuse to obey the judgment, opinion and mandate of this Court.

In 12 Cyclopedia of Federal Procedure, para. 6398, it is stated that "a second appeal is the appropriate remedy to effectuate a mandate from the Supreme Court to a State Court." Since writs of certiorari have taken the place of writs of error, the instant certiorari proceeding is now the appropriate remedy within the meaning of said authority.

On page 3 of respondents' suggestions, respondents complain that the cases cited by petitioner in his brief do not apply to the issues involved in this case for the reason that

such cases involve land titles. It is true, as respondents contend, that such cases do not involve rights claimed under the Federal Employers' Liability Act, but it is also true that in all the cases heretofore considered by this court involving the Federal Employers' Liability Act, inferior appellate courts, to which this court directed its mandates, obeyed such mandates and thereby made it unnecessary for litigants to appeal to this court to give effect to its judgments and mandates.

The right which petitioner herein seeks to have protected is more than a procedural one; it is the right to a jury trial guaranteed by the Constitution of the United States, and the right to claim the benefit of a jury verdict which this court held should not be reversed or even disturbed.

Respectfully submitted,

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